IN THE DISTRICT COURT OF THE
UNITED STATES IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARY GREEN, a widow,

Plaintiff,

vs. No. 8505-M-Civ-EC

AMERICAN TOBACCO COMPANY,
a corporation,

Defendant.

EDWIN M. GREEN, JR., as
Administrator of the Estate
of EDWIN M. GREEN, Deceased,

Plaintiff,

vs. No. 8070-M-Civ-EC

AMERICAN TOBACCO COMPANY,
a corporation,

Defendant.

Federal Courthouse,
Miami, Florida,
November 20, 1964,
10 o'clock a.m.

The above-styled cases came on for further trial before the Honorable Emett C. Choate, United States District Judge, pursuant to adjournment.

APPEARANCES:

As heretofore noted.

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THE COURT: Yes, sir.

(Whereupon, counsel for the respective parties approach the Bench and conferred with the Court out of the hearing of the Reporter.)

MR. HASTINGS: We will call Dr. Daughtry.

THEREUPON:

DR. DE WITT C. DAUGHTRY

was called as a witness on behalf of the Plaintiffs, and being first duly sworn, was examined and testified on his oath as follows:

THE COURT: State your name, address, profession, background and qualifications generally.

THE WITNESS: Dr. De Witt C. Daughtry. My office address is 1550 Northwest 10th Avenue. I practice chest surgery, surgery of the heart and lungs.

I have been in this field for approximately twenty years having graduated twenty-five years ago from medical school, Medical College of Virginia.

I belong to all of the specialty groups in my field.

I belong to the local medical association, the Florida Medical, the American Medical Association, American College of Surgeons, American College of Cardiology,

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American College of Chest Physicians and a number of other organizations.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. HASTINGS:

Q Doctor, here in Dade County we have a group called the Dade County Medical Association; is that correct?

A Yes.

Q Most of the doctors in the area belong to it?

A Yes, sir.

Q And you hold a post with the Dade County Medical Association?

A At the present time I am president of the Dade County Medical Association.

Q Doctor, have you any particular interest, specialized interest, in the field of smoking and lung cancer and, if so, tell us about it?

A This has been of great interest to me for a good number of years, and my interest was generated in this field because of my experience in the chest disease field which led me to this.

I have pursued it to a considerable extent for a good many years now to the extent of bringing it to the attention of our local doctors, our County Medical Association

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here in which we passed a resolution some few years ago---

THE COURT: Never mind about your resolution, Doctor.

THE WITNESS: My activity has been considerable in this field, both at local, state and at national levels in which I participated in many activities along this line.

BY MR. HASTINGS:

Q Have you done work on committees in any national organization?

A Yes, I have. The American Thoracic Society which is a branch of the National Tuberculosis Association.

I have been on many committees and still am on the National Board of Directors of this association.

Q Anything locally? Statewide?

A Yes, sir. I have served in that capacity of our State Medical Association and I represent now the State Association on a statewide committee on Smoking and Health in which we are setting up an educational program throughout the state beamed primarily at the children in schools, to try to set this up as part of the general health education program in all of the schools of our state.

Q Were you one of the principal treating surgeons with respect to the deased plaintiff in this case, Edwin

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Green?

A Yes, sir, I was the primary surgeon in this case.

Q Doctor, can you tell us whether or not you have an opinion as to whether there is a relationship or no relationship between the smoking of cigarettes and the development of lung cancer?

A I think there is a very direct and definite relationship between smoking and cancer of the lung. In other words, I think it causes a high percentage of cancer of the lung.

Q Are there any types of cancer of the lung in which the relationship is less or more firmly established?

A Well, in so-called adenocarcinoma or glandular type carcinoma of the lung I personally feel there is no relationship.

The epidermoid or squamous cell type carcinoma, I think there is a very direct relationship in which the vast majority are caused by the chain of events or effects of smoking.

Q Doctor, can you tell us what is your own experience that led you to come to this conclusion?

A Well, the thing that brought this to my attention early was in taking the history of lung cancer cases

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that we found that this seemed to stand out in most all of our cases of this particular type of lung cancer, which is the common type of lung cancer, that all of these people seem to be smokers and going on with coughing and irritative type of problems for a number of years before their cancer of the lung developed.

This brought this first to my attention. Then we became more and more interested and went into it in a more thorough way than we had in our earlier experience in this field.

Q Can you tell us, sir, if you, as a surgeon--have you found any changes in the tissues as you personally have observed them in a smoker as opposed to a non-smoker either from a gross examination of the tissues or from microscopic examination of the tissues?

A Yes. This has been rather obvious to us in many ways, in many aspects of our practice.

One, of course, is that patients that are heavy smokers, a high percentage have a chronic cough going back so long that they don't quite remember when it first started.

We notice that when taking these people off smoking, the majority of them had complete cessation of their cough or were so greatly improved or they no longer

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even admitted they had a cough.

Then in examination these patients, doing specialized procedure, one of which we look through a lighted instrument called a bronchoscope directly into the bronchial tubes, the bronchial lining or covering inside the bronchial tubes is quite often red and irritated and often upon rubbing the instrument over the lining it will bleed easily showing evidence of irritation where the same thing is very seldom seen in the non-smoking patient.

Then many times, of course, we actually look through the bronchoscope into the bronchial tubes of the lung and actually see certain areas of the lungs that are more irritated than others, and sometimes you--sometimes in getting a piece of tissue out of this we see changes which are so called pre-cancer changes in the lung and then some are called actual local cancer or cancer in situ where there are actually cells indistinguishable from cancer in the lung, and in others we see the cancer itself in the lung and get a biopsy which shows us it is a frank cancer, which means it is invading the tissues, going deeper into the tissues, and not just the local area on the surface of the bronchial lining.

Then, of course, when we get into the chest in doing the actual open operations on the chest we find the

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effects from smoking in the way of scar tissue and what we call emphysema, changes in the lung where there is no longer elastic---

MR. BRADFORD: Hold on. I object to him going into other matters, your Honor. We are talking about lung cancer.

THE COURT: Is there any relationship between emphysema and lung cancer, in your opinion?

THE WITNESS: It is a chronic disease and based much upon smoking. That is the reason I was bringing it out.

THE COURT: I will sustain the objection.

BY MR. HASTINGS:

Q Continue, Doctor.

A I was just going into the---

MR. BRADFORD: One moment, please.

THE COURT: Start your questions again.

BY MR. HASTINGS:

Q Have you finished with what you were saying?

A Not completely.

Q Proceed.

MR. BRADFORD: I object. I understood the Court sustained the objection.

THE COURT: Stay within the realm of the

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signs of lung cancer and things that might grow into or cause will be a sign of the development of lung cancer, if you will.

Proceed.

THE WITNESS: The other is, of course, when we find the tumor in the lung it has certain characteristics that, of course, tell us it is a tumor and not some other problem.

When we look at it under the microscope, which surgeons as well as pathologists go to the pathology department and examine these specimens themselves. They have an opportunity then to see not only the pre-cancer lesion, the type changes that lead up to cancer, but also the so-called local cancer or cancer in situ, and then the frank cancers of the lung which we see so much today and previously did not see anywhere near as much of.

So, this has been somewhat my experience and it is easy to tell these things when you look at the lung or the bronchial tubes, particularly under the microscope.

BY MR. HASTINGS:

Q Have you personally found in your experience, Doctor, any chance in the incidence of cancer of the lung? By that I mean the rate.

A There has been a tremendous increase during my professional experience of some twenty years in this field.

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We see a great deal more of it than we did when I originally entered the field of chest surgery.

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Q. Doctor, what percentage of this type of cancer is epidermoid or squamous cell that you stated is related to smoking? What percentage does that constitute of the different types of cancer of the lung?

A. In a recent survey of our rather large experience, it was 79 per cent in our practice.

Q. When you say "our practice," can you tell us what hospitals you operate out of?

A. We actually operate at most all the hospitals. And when I say "we," it's a group of surgeons. I am the senior partner of a four-man group, and we cover all the major hospitals.

Q. What are they?

A. The majority or most of our work is probably done at Jackson Memorial Hospital which is, of course, our largest hospital. We do a lot of it at Mt. Sinai, at Baptist Hospital, St. Francis, Mercy, North Shore, North Miami General, Hialeah, Miami Heart Institute, St. Francis, Doctors, Baptist. There is no hospital of any size in the community that we do not operate in.

Q. Doctor, do you know what the substance is or what the substances are that bring this about?

A. It certainly is the irritative effect of

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smoking, and there are many elements, chemicals and substances that are in the main smoke stream that people inhale. And we think there are several things in it that cause its effect. Nicotine certainly causes one effect, which is more the addicting effect of cigarette smoke.

That is the thing that I think keeps people from being able to stop when they want to, many of them. Others, of course, are the tars, the various substances so-called tobacco tars.

And then there is an element of the arsenic in the mainstream of cigarette smoke which is inhaled.

Those are roughly the chief things that we think in terms of as being harmful.

Q. Doctor, can you tell us what the aromatic polycyclic hydrocarbons are?

A. Yes. This is one of the things that is in the tar that we mentioned. And it is felt that this-- and when I say "it is felt" I feel it's one of the harmful factors in cigarette smoke. There are still some unknowns which are more harmful but as a group we feel they are very harmful to the lungs and the human body.

Q. Doctor, based upon your experience, what would you say or would you have an opinion as to what the

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chances are of a person developing lung cancer if he is a moderate or heavy smoker?

MR. BRADFORD: Just one minute. I submit that the doctor has not yet qualified as having made studies of numbers of cases upon which he could base any opinion of that nature.

MR. HASTINGS: Your Honor, I believe he stated he had 27-odd years at his clinic.

THE COURT: Well, have you made any studies as to probabilities based upon a recognized study?

THE WITNESS: I am not a statistician, and I have not gone into this in any detailed manner. My knowledge is based upon my own experience or what is generally accepted as the experience of the qualified statisticians of the country.

BY MR. HASTINGS:

Q. What is the percentage, if you know, of the people who have the type cancer that you say is 79 per cent--

MR. BRADFORD: I would object to the doctor expressing an opinion based upon some statistician when we don't know what supporting figures he may have

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read about.

MR. HASTINGS: Based upon his own medical knowledge as well as his medical studies.

THE COURT: Among your patients, have you people who smoke as against people who do not smoke? Do they smoke a lot or people who smoke a little, et cetera?

THE WITNESS: Yes. I feel very strongly that the rate of cancer of the lung, the kind we are speaking of, is based upon the duration one has smoked, the amount they have smoked and their smoking habits as to how they inhale and things of that kind. These are the things that increase or decrease the rate in any segment of our population.

And it is well-known and generally accepted among all professional circles as to what the percentage--

MR. BRADFORD: Just one minute. I object.

MR. HASTINGS: Just tell us from your experience, not from professional circles.

THE COURT: Your experience.

MR. BRADFORD: I instruct the Court to please ask the jury to disregard that statement.

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THE WITNESS: May I ask a question, your Honor? I can't say from my experience because I haven't gone out and followed a hundred thousand people who have been nonsmokers and how many could have been smokers. And so I couldn't say an exact percentage from my own experience of people who would smoke would develop cancer of the lung.

THE COURT: Well, how many cancers of the lung have occurred in your experience among smokers of considerable duration as against nonsmokers?

THE WITNESS: Of this particular type cancer of the lung, I have not seen one in my experience in a nonsmoker. I have not seen this particular type cancer of the lung in a nonsmoker in my experience.

Our experience in our own private practice excluding those that we see at the Veterans Administration Hospital and the various charity services that I am involved in in the area, which are considerable, our private practice consists of 1,500 cancers of the lung.

BY MR. HASTINGS:

Q. And what time is that?

A. This is over the period of--when I say "private practice," that would be 16 years in private

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practice.

Q. Do you serve as a consultant at the Veterans Hospital?

A. Yes. I am the thoracic surgical consultant there.

Q. Doctor, in this lawsuit we are concerned with the elements of the question of pain and suffering that the decedent, Edwin Green, had from the time of the development of his lung cancer to his death.

Could you tell us, sir, based upon your knowledge of this case, could you just express to the jury and the Court what was his, if any, pain that he had or suffering that he had, to the best of your knowledge, and what type of treatment in general contributed to his pain and suffering?

A. The type which Mr. Green had from his location, and when I say type I mean the location of it, was probably the most painful location that one has.

Let me state this right now: this is about the most painful location to have a tumor, is where his was, in the top part where the large nerves go to the arm and soon spread into these nerves. And

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this is a very painful type of cancer of the lung because of its location near the large nerves of the trunk.

Q. Doctor, he underwent, I think, under your hands some surgical procedures. I believe you cut out a piece of tissue from a node; is that right?

A. Yes, I did three surgical procedures. One was the bronchoscopy, looking into the bronchial tubes in which we saw some bleeding coming from the area of the lung, and as I looked into the esophagus, trying to rule out everything in that area that might possibly produce the next thing which I will mention, and then took this gland out of the neck, a large gland in the right side of the neck. And this, of course, proved that the lesion was cancer. And this gland here is one that would come, say, from the swallowing tube as well as from the lung. That is why we looked well into the swallowing tube to rule out the problem there.

These were the procedures that we performed in the way of surgery upon Mr. Green.

Q. And when a tube is put down there to look at the lung itself, is he anesthetized at the time you do it?

A. We did it in this particular instance

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because we had a number of things to do. Quite often we do this under local. But this was general. We had three procedures to do.

Q. After he comes out of the anesthesia, is there any discomfort from having had this procedure done?

A. Yes, there is soreness and pain. And in the particular type procedures done, it is not great, but there is soreness where the small incision was made of the neck. And the others produced some discomfort but not great.

Q. Doctor, is there any discomfort or pain coming from cobalt therapy which he received?

A. No. Cobalt therapy as a rule doesn't produce pain. It produces other side effects that may be rather profound, but not pain.

Q. Do you know whether he experienced any pain or discomfort from a psychic standpoint at the time you were seeing him as a result of this cancer?

A. Well, we saw him multiple times, reassuring him and things of that kind. So this is routine. We do this, and some people need more reassurance than others to try to carry them through a catastrophic situation of this kind.

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We did see him many times and we tried to reassure him that we were doing everything possible to help his condition, realizing that these things were not going to be curative.

Q. Doctor, was he receiving at this period of time some type of pain-killing or pain-alleviating medication?

A. Yes, he did. Throughout the course of the illness he did receive pain-killing medication because, as I said before, the location of this is rather a painful area. So it was necessary for him to receive considerable pain medication.

Q. Toward the end or toward his demise, did he have any difficulty in breathing?

A. The usual amount which accompanies any terminal situation of this kind. But this was not any great amount until shortly before his death.

MR. HASTINGS: You may cross-examine.

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CROSS EXAMINATION

BY MR. BRADFORD:

Q. Dr. Daughtry, I believe you said you examined Mr. Green carefully. You did examine his throat, did you not?

A. Yes, sir.

Q. And was it perfectly normal when you examined it?

MR. HASTINGS: Your Honor, we are not retrying the case of Mr. Green. The only thing that is pertinent is as to the pain and suffering he may have had.

THE COURT: I will let him answer that. I don't know what he's getting to.

THE WITNESS: Let me look back at my notes at that time, if I may, please.

I did not see anything abnormal in the throat itself.

BY MR. BRADFORD:

Q. All right. How about the trachea?

A. I didn't see anything in the trachea of any great significance, but coming out of the left bronchial tube we saw the blood which was previously

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reported, in the left bronchial tube.

Q. Was that up into the tube, up high?

A. It was trickling down. We could see it running out of the opening of the tube.

Q. Where was this defect that you found, Doctor? Could you locate it for us?

A. The tumor itself?

Q. Yes, sir.

A. That was in the top part of the left lung.

Q. You put your hand on your shoulder, your left shoulder.

A. Yes, just under the rib. It was very close to the surface.

Q. I believe that you have stated that, in your opinion, cancer comes from chronic irritation. Is that the substance of what you told us?

A. I think so, yes.

Q. And, Doctor, are the same type of cells about the body in other places than in the throat and in the lungs, do you have the same type of cells?

A. Yes.

Q. Squamouns cells?

A. Yes; there are several areas that we have

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the same type cells that we have in this particular tumor which he has.

Q. Could you tell us what they are, Doctor?

A. One, of course, is the skin. The other is the esophagus. Those are the primary ones that we have, the swallowing tube and skin. And in the lung we don't have this type lining until the irritation comes along and produces this particular type lining.

Q. What about the cervix of the uterus?

A. We do; but I was confining it to the male.

MR. HASTINGS: Your Honor, I guess that's a little far afield. Mr. Green was a male, not a female. He is talking now about female organs.

BY MR. BRADFORD:

Q. Doctor, do you feel that the full story is known to you doctors as to the cause of epidermoid lung cancer?

A. I don't think the full story is told, no.

Q. What is your opinion as to the necessary period of exposure or irritation in order to produce a lung cancer?

A. I have seen it within ten years, but most often it's considerably longer. And we start thinking

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of the serious effects of smoking coming in at 15 years. And many of them may get it much later--20 or more years after starting smoking.

Q. As a matter of fact, you have expressed an opinion of 20 to 30 years, have you not, sir?

A. Yes.

Q. And is that, in your opinion, if there is an association for that period of time, a condition where the irritation is constant and heavy or frequent or not?

A. Well, I think the more constant or more frequent the irritation, the greater the likelihood and, of course, the duration, too, affects it.

Q. Is there a variation in the locations of the quantity or the number, if you want to count them, numerically, of lung cancer, even with comparable smoking history, such as between city-and-city and rural and urban?

A. Yes, I have read this, I think.

Q. Well, sir, I would rather you would stick to your own. If you don't know or if you have no personal experience--

A. Personally, I don't. I don't have any

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personal experience.

Q. Is age, in your experience, a factor in whether or not a person is likely to get lung cancer?

A. I think I would have to state it this way: it's more common in people middle-aged or past, but not limited to it.

Q. Now, are there different kinds of lung cancer primary?

A. Yes, sir.

Q. I believe you mentioned on direct examination the adenocarcinoma or cancer of the lung, is that right?

A. Yes.

Q. And that in your opinion has no relation to smoking, does it, Doctor

A. I don't think so.

Q. And there are people who do have primary lung cancer who do not smoke, isn't that correct, sir?

A. The adenocarcinoma, in my experience in some of the rare ones, but not the ones we were mentioning.

Q. Is it your statement or do I understand you to say that there are no squamouns cell cancers of

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the lung in people who do not smoke?

A. I don't remember one in my experience.

Q. Just from your experience.

You do know, though, in this community of children who have squamous cell primary lung cancer, don't you? It may not be in your patients.

A. No, sir. I don't know of it.

Q. You don't know of it?

A. No.

Q. You do laboratory work in testing cigarettes. Do you, Doctor, do laboratory work in testing cigarettes or cigarette smoke?

A. No, sir.

Q. Then I assume that the statement you have made here about th.ar being carcinogens in cigarette smoke came from som.thing you read or studied some place; is that right, Doctor?

A. Yes, sir.

Q. What about tar and nicotine in cigarettes? Have you made any study of such things in cigarettes?

A. I made no study of it, no, sir.

Q. Then you base your statements regarding those items upon something that you have read some place;

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is that correct, sir?

A. Yes, sir.

Q. You are not a pathologist, are you, Doctor?

A. No, sir. I spent a good while in it in my training period, but that is not my line of work now.

Q. And with respect to tars, you are not a chemist, so you have not studied the tar incigarettes, have you?

A. No.

Q. And you would not be able to tell this jury the quantity of either the tars that you spoke about or the arsenic or the nicotine or anything of that nature that is in cigarette smoke, would you?

A. Not without having someone analyze it for me.

Q. Doctor, have you made the statement that smoking is not the only cause of lung cancer, but there must be other causes? Have you made such a statement?

A. Yes, I think I would make that statement now if I were asked it.

Q. What about the facilities we have today in detecting cancer so that we have a greater numerical number than we did, say, 20 years ago? Do you feel that

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the change in our facilities, such as hospitals, trained doctors and know-how-technique has produced a number who were previously undetected?

A. I am sure that that is true.

Q. You mentioned polycyclic hydrocarbons. That is something that we get from burning any organic matter, isn't it?

A. I understand that it is in other substances, yes.

Q. It's in things we eat if you burn it, isn't it?

A. Yes.

Q. Such as a steak, as a common example?

A. I understand so.

Q. And as to the quantity in a cigarette as compared to the quantity of that material in a steak, you are not in a position to state because you have not studied it and you are not a chemist; is that right?

A. That is right.

Q. By the way, did Mr. Green have, I suppose you pronounce that, dysphasia? Did he have that problem?

A. Yes. He had complained earlier and that is why, in the pursuit of the examinations, that was

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one of his complaints.

Q. Would you explain so the jury will understand what that is?

A. That is a little difficulty in swallowing. He stated that he had a little hanging of food at times when he would swallow.

Q. Over what period of time?

MR. HASTINGS: I think that's irrelevant and immaterial now.

MR. BRADFORD: This is going into his general condition.

THE COURT: Well, I will sustain the objection.

Mr. Green died of cancer and it has been established in other proceedings, without any equivocation as far as we are concerned, that one of the proximate causes of cancer was the smoking of cigarettes.

Mr. Green might have had smaller or other weaknesses--

MR. BRADFORD: But this would go to the general condition of the man, your Honor. They had gone into the damages and this would go to that element also, and I proffer it.

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THE COURT: I don't recall anything that he was under a disability at the time. He had both legs broken and he had 100 per cent disability as far as moving around on his legs, so his wife said. And he did cough for many years.

MR. BRADFORD: Well, if it is the Court's view that the plaintiff cannot recover for earning capacity, then I will withdraw the question.

THE COURT: Oh, no, I don't say that at all. I say his physical disability does not mean that he had no earning capacity.

I recall that one of our great scientists was a man who was always disabled physically--

MR. HASTINGS: Steinmetz.

THE COURT: One is mind and one is body. But I think there is very little question about his body condition.

But go ahead and ask him about that if that worries you.

MR. BRADFORD: Because I think anything that goes to the man's general rehabilitation is an issue here.

THE COURT: Go ahead.

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BY MR. BRADFORD:

Q. Now, sir, would you tell the jury how long this dysphasia had laster?

A. He stated at the first visit in my office on January 25, 1956, that for a couple of years he had had a sensation of the hanging of food in his throat or esophagus.

Q. Were you able to find any reasonable cause for that, medically?

A. No. And we went into it in considerable detail in the way of X-rays and this specialized study in which we viewed the entire inside of the esophagus. And we found no cause for that.

Q. Now, did he have any arthritic condition in the back?

A. I don't have any notation of that in my original interview. I don't remember going through that as being enough of a symptom to call our attention to it.

Q. Did you make a diagnosis in the hospital record, sir, of advanced degenerative arthritis in the dorsal spine?

A. I don't remember if I did. If I did, I don't remember it now if I made the notation.

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Q. You were the doctor who would make notations in the hospital records, were you not?

A. I would be one of many who would make them in the chart.

Q. Doctor, do you know what happens in a cell, a human cell, to cause cancer?

A. If you mean what chemicals or other changes take place, we know how to recognize changes in a cell. But when it comes to the--I guess your very basic point, if that's what you mean, of exactly what does take place to set this off, I don't guess I could say that. I don't know that.

Q. Are studies being made today in large institutions all over the United States trying to determine the cause of cancer and what happens when a cell does change like that?

A. Well, there are a lot of cell studies being made to determine what happens in the cell in cancer and in many other illnesses. So I presume there are studies going on along this line.

Q. In your opinion, Doctor, are people predisposed or markedly susceptible to this disease or whatever you want to call it?

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A. I presume they must be because some people get in trouble from the same effect or from the same contact that others do not.

Q. Do you mean by that that people who do smoke have lung cancer and people who do not also get it? Is that one example that would illustrate what you have just said?

A. Yes. Not everybody who smokes developes lung cancer.

Q. As a matter of fact, a great majority of them who smoke do not get lung cancer, isn't that right?

A. Well, statistically we know how common it is.

Q. As a matter of fact, it would be a fair statement to say that medical science knows very little or they poorly understand cells and cancer cells, isn't that correct, Doctor?

A. Please state that again.

Q. Medically or medical science poorly understands cancer cells and the cells themselves?

A. Yes. A lot is known, but certainly a lot is unknown.

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Q. Doctor, did you review your cases in your office, those that you have had contact with, before coming down to testify here today?

A. No, sir. I reviewed them January of 1964 to present a paper on Miami Beach to a convention. That is why I reviewed them.

Q. In your experience is lung cancer more common in men than in women?

A. Yes, sir.

Q. I am talking about primary.

A. Yes, sir. The margin is narrowing, though. It has recently.

Q. What in your experience is today's ratio as to the primary cancer between men and women?

A. In our practice it is about 8 to 1.

Q. What was it, say, ten years ago?

A. Maybe 20 to 1 in our experience.

Q. Can you look at a lung and examine it after death and tell whether or not that person was a smoker or nonsmoker?

A. Yes.

There are many changes there that would lead us very strongly to say whether this patient was

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a heavy smoker or a light smoker or nonsmoker, yes, sir.

Q. How would you tell it, Doctor?

A. The lung loses a lot of its resiliency. In other words, the lung loses a considerable amount of its elasticity and does not have the same consistency and, also, a fair number of changes which we call boluses and blebs, they are blisters on the lung, we feel this is associated with smoking to a high degree.

Q. Doctor, can you tell whether or not in looking at a lung whether the person--if it is a lung cancer--whether or not the person was a smoker or non-smoker by looking at the cancer under a microscope?

A. I don't think I could, no, sir. The type would, of course, help some, to show the type of tumor.

Q. How many cancers have you seen in the trachea?

A. I can't tell you the exact number but it's been comparatively few compared to my experience with the lung.

I have seen a few, but there haven't been a great number.

Q. Well, could you give us a little better idea of that? Is it limited to two, three, four?

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A. I don't think I have seen more than eight or ten. So, it would be comparatively small, say, to 1,500, to eight or ten. In fact, I am sure my experience with cancer of the lung goes probably two or three or more thousand. That is not on private practice.

Q. Doctor, do you know what triggers or causes a change in a cell, particularly an epidermoid?

A. What triggers a change?

Q. Yes, sir.

A. I can't tell you if you ask me what element and what effect it may have on the nucleus of the cell; but if you say irritative effects, I think certainly that irritative effects are known to us and we know that certain irritative effects on the cells do certain things.

Q. You do not know what triggers the cell itself?

A. I don't know what triggers the change in the cell itself.

MR. BRADFORD: No further questions.

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REDIRECT EXAMINATION

BY MR. HASTINGS:

Q. Counsel asked you what great majority do or do not get lung cancer.

Can you tell us to the best of your knowledge what figure of smokers do get lung cancer?

A. I'd say of the heavy smokers it would be one out of eight, or ten people, who smoke heavy for a long time that will end up with cancer of the lung.

MR. HASTINGS: That is all we have. Thank you.

MR. BRADFORD: Your Honor, the doctor has said in his own studies he--- He didn't give that a while ago. He said he would have to take figur , from other people.

I object and move that be stricken.

THE COURT: Did you take those figures from your own experience or some others?

THE WITNESS: I couldn't take them from my own experience because I haven't done studies of this type.

My experience generally tells me certain

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things.

THE COURT: It will be stricken.

You estimate that to be true?

THE WITNESS: Well, this is generally accepted figures.

MR. BRADFORD: Just a moment.

I move that be stricken.

THE COURT: It will be.

MR. HASTINGS: The reason I asked it is because he asked it in cross. He said is it not a fact the great majority do not get--- The doctor at the time said he would have to tell him based on what he reads.

MR. BRADFORD: Is the remark stricken, your Honor?

THE COURT: Yes.

You are excused.

(Witness excused)

MR. HASTINGS: Your Honor, at this time the plaintiff will read excerpts from the deposition of the deceased Mr. Green, beginning with page 3.

"Q. State your name.

"A. Edwin M. Green.

"Q. What is your present address, Mr. Green?

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"A. [DELETED]

"Q. What is your age?

"A. Forty-nine.

"Q. How long have you lived at your present address?

"A. About 21 to 22 years.

"Q. In what state were you born?

"A. Florida.

"Q. Have you lived in Florida all your life?

"A. Yes, sir."

Reading from the transcript, page 11:

"A. Well, I was injured in an accident on Guam on VJ-Day.

"Q. I am sorry, I missed that. You were injured?

"A. Injured in an accident on VJ-Day.

"Q. What type of injury was that? How were you injured?

"A. Well, it was a celebration of VJ-Day. I guess there was quite a bit of drinking going on and shooting off guns and the chief officer of our outfit and myself were driving in a

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Jeep on Marine Drive on Guam and an Army pfc, whom I understand was drunk on captured Saki he had stolen, was driving a 6 by 6 truck and he was joyriding.

"The MPs were chasing him. He came around a line of trucks and headed on into the Jeep that we were in.

"They had to cut me out of the Jeep. The Jeep just folded me in it.

"The officer with me, threw him some 60 feet and busted him up pretty bad.

"I was in the hospital on Guam approximately two months. They evacuated me to Oakland, California. I was in the Oakland Hospital from December '45 and I was transferred to NAS hospital at Jacksonville.

"I had a compound fracture of both knees and osteomyelitis set in.

"They transferred me from the hospital in NAS Jacksonville to the Naval Medical Center at Bethesda, Maryland, where I was confined until I was retired.

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"Q. About when was that?

"A. First of October, 1947.

"Q. You were in the hospital on Guam from August until September?

"A. Until the middle of September.

"Q. About the middle of September? 1945?

"A. That's right.

"Q. Then you went from Guam to Oakland?

"A. Oakland, California.

"Q. You were there from the latter part of September, 1945 until when?

"A. The latter part of December.

"Q. Until the latter part of December?

"A. Because I arrived in Jacksonville the day before Christmas.

"Q. Of 1945?

"A. Of 1945.

"Q. You were in the hospital at Jacksonville from December 1945 until about when?

"A. I think it was February that I was transferred to Bethesda.

"Q. That was February of 1946?

"A. '46.

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"Q. You remained in the hospital in Bethesda, Maryland, how long?

"A. Until October 1, 1947.

"Q. Were you hospitalized all of that time?

"A. No. The last three or four months, when I was in Bethesda, I was in the out-patient Department.

"My family had moved to Washington.

"I went in daily for physiotherapy. I went in daily.

"Q. Did you receive any other injuries that you know of other than the fractures of your knees?

"A. Yes, I had a skull fracture. My skull was fractured and my jaw was broken--some ribs broken.

"Q. Then you were released after having been in the out-patient for two, three or four months you said, in October of 1947?

"A. Yes, sir. I went before the Retirement Board and retired as of the 1st of October.

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"Q. Was that a physical disability retirement?

"A. Yes, sir.

"Q. Did they give you a rating at that time?

"A. Yes, sir.

"Q. Can you tell us what it was?

"A. Total disability.

"Q. Let us go back, if we may, to your early childhood. Did you suffer any of the childhood diseases?

"A. I guess I had all the general childhood diseases.

"Q. Mumps, measles, chickenpox?

"A. And chickenpox.

"Q. Did you have any others that you recall?

"A. I had diphtheria.

"Q. When did you have that?

"A. That was when I was in Jacksonville, so it must have been somewhere when I was around five or six years old.

"Q. Did you ever have pneumonia?

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"A. No, sir.

"Q. Influenza?

"A. Possibly influenza. I had cat fever when I was in the Navy.

"Q. Is that the same thing?

You spoke of having cat fever while you were in the service. About when was that?

"A. That was in the latter part of 1943.

"I was at Davisville, Rhode Island. I qualified as a Navy deep-sea diver, and it was pretty rough weather at the time I got there. I think they call it cat fever, catarrh. It turned into yellow jaundice.

"I was only in Sick Bay about a week.

"Q. What were the symptoms? What do you feel like?

"A. Confidentially, while I had this yellow jaundice, you feel like hell.

"Q. About Christmas of 1946, what occurred?

"A. Well, the thing that happened was I started coughing up a little blood, you know, like when you brush your teeth in the morning

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sometimes you scrape your gum a little bit and it gets a little blood. You spit it out.

"I seemed to have a hanging in my throat that worried me a little bit. I thought perhaps that maybe it was a gum bleeding.

"I went out to the Air Station at Opa-locka and told them I was hacking up a little blood and my throat had a catch.

"The first thing they did was to give me a chest X-ray which didn't show them anything.

"I told them it was my throat. They gave me barium, and took fluoroscopes.

"They said they thought I had a soft tumor in my throat and probably had caught some food on it and maybe ruptured the blood vessels in coughing.

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"Since the hemorrhaging stopped, they said it was nothing to worry about. Quite naturally, it stopped, too. It started back to hemorrhaging some and in Opa-locka there was no such reserve status at that time and I thought it was advisable for me to go out to the Veterans Hospital at Coral Gables since the Marines were sending their men out there.

"I went through the same procedure there, except they just took lung X-rays, and they told me on their report that I had TB of the left lung.

"I told Dr. Rogers what they had diagnosed it as.

"Dr. Rogers made an appointment with Dr. DeWitt C. Daughtry and Dr. Daughtry took X-rays, and he had the Navy X-rays which I furnished him, the originals, and he called the Veterans and got the whole picture. The only additional thing was to start the sputum tests for the State Board of Health.

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"This sputum test came back negative on TB.

"I presume from there on, why, it is all of record and Dr. Daughtry's report.

"He will tell you more about that ahn I can. Mine would be hearsay.

"Q Their diagnosis of your condition, as told to you, at least, at that time, was tuberculosis in the left lung?

"A That's right.

"Q Were you treated any at the Veterans Hospital?

"A No, sir.

"Q Did they recommend treatment?

"A No, sir.

"Q They simply diagnosed you and said that is it?

"A They had no facilities they said to take care of me."

Reading from page 20 of the transcript:

"Q Would you please tell us where you were born, Mr. Green?

"A Newberry, Florida.

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"Q. Where is that?

"A. Well, that is about 18 miles from Gainesville, Florida.

"Q. The north central part of the state?

"A. Yes.

"Q. Where did you move to after you left Newberry?

"A. Jacksonville.

"Q. You were about two years old when you moved?

"A. Yes.

"Q. How long did you reside in Jacksonville?

"A. Till 1916.

"Q. How long did you live in Jacksonville?

"A. Till 1916.

"Q. Are either your father or mother still alive?

"A. My mother is alive.

"Q. How old is she?

"A. She must be seventy-three.

"Q. Where does she reside?

"A. [DELETED]

"Q. When did your father die?

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"A. Just before Pearl Harbor. When was that--December of 1940 or 1941.

"Q. Where was he residing at the time of his death?

"A. Miami.

"Q. Do you know what the cause of his death was?

"A. Cardiacthrombosis.

"Q. Was he hospitalized?

"A. He was not.

"Q. Had he been prior to his death?

"A. He had not.

"Q. Do you recall the name or names of the physicians who treated him?"

MR. BRADFORD: I have no objection to it but I do not think it is relevant.

THE COURT: I do not think any of this is helpful to this particular case.

MR. HASTINGS: Only as to the heredity aspect, your Honor.

THE COURT: Proceed.

MR. HASTINGS (Reading)

"Q. He had no previous disability?

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"A. Not at any time.

"Q. No previous hospitalization?

"A. No, not around that time.

"Q. Do you have any blood relatives who are now living either on your father's or mother's side?

"A. Yes.

"Q. Can you tell me who they are?

"A. Well, I have an aunt, Mrs. John B. Knight, Nashville, Georgia. These are all on my mother's side.

"Q. Do you know her approximate age?

"A. In her late sixties. B. F. Brooks, Rhuey B-r-o-o-k-s and Bob Brooks; three uncles on my mother's side.

"Q. Where do they live?

"A. Rhuey Brooks lives with my mother at [DELETED]

"Q. What is his approximate age?

"A. About seventy-six. Bob and Bart Brooks live at [DELETED]

"Q. Can you give us their approximate ages?

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"A. Bart must be in his early sixties and Bob is a few years older.

"On my mother's side, I have an aunt, Eva Rolfe, R-o-l-f-e. She lives in Syracuse, New York.

"Outside of cousins--

"Q. What is her approximate age?

"A. She must be in her seventies.

"Q. You said that your father had not had any immediate previous disability to his death from the cause you stated."

THE COURT: How much more of that do you have?

MR. HASTINGS: Very short, your Honor. I am on page 23 and I go to 34.

THE COURT: We will take a recess for 15 minutes.

(Recess taken)

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MR. HASTINGS: Your Honor, before the jury comes in, after I finish reading the deposition of Edwin Green, we want to withdraw the picture here that we have exhibited, which was torn off. Actually at the last trial we were able to get in the entire picture and also the other part which I felt was important to show an entire family.

THE COURT: I think it looks better than with the family.

MR. HASTINGS: In view of the fact that your Honor will not permit it, I would like to withdraw this exhibit since it has not been seen by the jury. That is Exhibit No. 5, unless I put in the entire exhibit.

THE COURT: Do you have any objection?

MR. BRADFORD: We have no objection to his withdrawing it.

THE COURT: Permission to withdraw Exhibit No. 5 is granted.

(Thereupon, the jury resumed their seats in the jury box.)

THE COURT: If you are ready to proceed, you may do so.

MR. HASTINGS: I was reading the deposition of Mr. Green.

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THE COURT: You may continue.

MR. HASTINGS: (Reading)

"Q You said that your father had not had any immediate previous disability to his death from the cause you stated. Had he had any previous disability of any kind within the near proximity of the time of his death?

"A No. There was nothing of any consequence. He had a broken arm, but that is minor.

"The family doctor is Dr. Hunter B. Rogers that he went to.

"Q So in the period of time, from the time of your birth in Newberry until you went to Jacksonville and then to Orlando, you were residing with your family?

"A Yes.

"Q How long did you reside in Orlando?

"A We must have lived there about four years, approximately four years.

"Q Then to where did you move?

"A West Palm Beach.

"Q How long did you live in West Palm

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Beach?

"A Well, the family moved to Miami. I guess Clinton came down around '24. I guess I didn't come down until '26.

"Q After 1926, what did you do?

A Came to Miami. I came down during the '26 hurricane. I drove an ambulance here, and then I stayed here after the hurricane.

"It was in '27, '28 and '29 I worked for the Munson Steamship Line as dock superintendent.

"Q When you were working as dock superintendent, were you interested in the tra sportation of general cargo?

"A Yes.

"Q In the loading and unloading of it?

"A Yes.

"Q How long a period were you in that position?

"A I think it was two years, from '27 and '28. '29 was when I went to Clyde Mallory.

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"Q How long were you in that position?

"A Well, I went to work for Southern Daries, I guess, in 1930. I worked for Southern Daries as a cashier and general until I was married. I was working there when I was married.

"Q When you left Southern Dairies, what did you do?

"A I went into the construction business.

"Q About 1933-34?

"A Yes.

"Q Was that as an employee?

"A Now just a minute. My father and I--when I left Southern Daries, we formed Green & Company, Building Supplies.

"Q Green & Company Building Supplies?

"A Green & Company Building Material Supply Company. He had a yard and office at 60 Northeast 21st Street and I was, I guess, there for approximately two years. We went into the construction business together.

From there we went into the general

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contracting business.

"Q That was about 1936?

"A Yes, 1935, I guess. We operated under the name of Edwin M. Green.

"Q Where were you located at that time?

"A Well, we operated from my house. I had an office in my house at 2712 Northwest 17th Avenue. It was operated under that name until I went in the service in 1943.

"Q Was that a general contracting business?

"A General building contractors.

"Q You built houses or office buildings or store buildings?

"A General building.

"Q What activity did you engage in in connection with the business?

"A Well, I did most of the estimating and the supervision of construction.

"Q You spent a considerable amount

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of your time out on the job?

"A Outside.

"Q Where did you enter the service?

"A Norfolk, Virginia.

"Q Were you drafted?

"A No, sir.

"Q You enlisted?

"A I went in on an appointment.

"Q An appointment at an officer's rank?

"A Yes.

"Q Where were you examined with respect to your physical?

"A Langford Building, in Miami.

"Q What branch of the service were you in, sir?

"A Navy.

"Q After your appointment, you reported for duty at Norfolk?

"A That's right, sir.

"Q Give us a brief resume of where you went from the time you reported in Norfolk, Virginia, on April 1st, and the

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type of duty you performed?

"A Well, I was attached to the Civil Engineer Corps, and the only duty we had in the United States was indoctrination of training.

"We went from Whalesburg, Virginia, to Camp Perry. I was there possibly four months.

"From Camp Perry we went to Davisville, Rhode Island, which was a POE in advance training.

"From Davisville we went to Gulfport, Mississippi, to another training school.

"We were in Gulfport only a short period of time, and we went to the port of embarkation, which was Port Benecia, California.

"We went from Benecia to the Central Pacific, Eniwetok, and we were attached to MAG 22, handling the construction end of their work on runways and heavy equipment.

"Q During that particular period,

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the period that you were in Eniwetok, what were your individual specific duties?

"A Well, I was runway officer.

"Q Did that indicate you were in charge of the construction or repair of runways?

"A That is correct. I was Heavy Equipment Officer, Cargo Officer, and Beachmaster.

"Q What duties did heavy cargo entail?

"A That was unloading all ships that came in, and all the heavy equipment that was under my supervision.

"Q Is that road tractors and heavy road building machinery?

"A Yes, that's right; cranes and road building equipment. We did runway work and all state roads in conjunction with the aprons.

"Q How long were you engaged in that particular operation?

"A Well, up to VJ-Day.

"Q In other words, you were there

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from when to when?

"A Well, I can't give you the exact dates on that. From the invasion of Iwo Jima--I don't know. MAG 22 was supposed to go to Iwo Jima. There was a change of orders. We were sent from Guam and we were maintenance for NSF at Guam until VJ-Day--from Saipan to Guam.

"Q What specific duties were you assigned to during the period of the time you were on Guam?

"A Well, on Guam, we were maintenance to NST. I took over all of the recreation facilities for our outfit and handled welfare and recreation on Guam.

"Q You did not participate in any kind of construction work?

"A I didn't participate in any construction work.

"Q During the period of time, from the time of your accident up until the time you were released from Bethesda, did you have any complicating illnesses?

"A None other than the bone infection,

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the osteomyelitis in my leg.

"Q You did not have any respiratory complications?

"A No, sir.

"Q Complications that were as a result of your hospitalization?

"A No, sir.

"Q After you retired from the Navy on a disability rating, where did you go?

"A Came back to Miami.

"Q That was in October of 1947. Did you resume your residence on 17th Avenue at that time?

"A That's right.

"Q Were you engaged in business after you returned to Miami in the latter part of 1947?

"A Latter part of 1947? No, I didn't. I did some estimating work for Lincoln Construction Company.

"Q Was that work done at their place?

"A Yes, sir. They had offices in the Lincoln Building at the corner of Lincoln Road and Washington Avenue.

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"Q Were they engaged in the construction business?

"A They were engaged in the construction business.

"Q Did you do your work in the office building?

"A Yes, sir.

"Q Did you do any work on their jobs?

"A Not on the job; but all office. I was on arm crutches at that time. It was just an estimating job there in the office.

"Q How long did you do that?

"A I was with them approximately six months, I guess, and the superintendent and myself formed a company, Dawson & Green, and went back into the construction business on our own.

"Q That was about in March of 1948?

"A '48.

"Q Was that a partnership?

"A Yes, sir.

"Q You were engaged in the general construction business?

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"A General construction.

"Q How long did you continue in that arrangement after, approximately, March of 1948?

"A We were partners for about a year and we dissolved the partnership and incorporated the name of Dawson & Green, and later changed it back to Edwin M. Green, Inc.

"Q During the year that Dawson was a partner of yours, from March 1st or thereabouts, 1947 to 1948, what type of work were you doing--you, personally?

"A I was handling the estimating and office work, and Dawson was handling all the outside work and supervision.

"Q Were you engaged in a substantial number of buildings and the construction of them during that period?

"A Yes, we did quite a bit of work. We built the clubhouse on Miami Beach Kennel Club at that time.

"Q The Miami Beach Kennel Club?

"A We did some work for the Dupont

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Building. I imagine the clubhouse at Miami Beach Kennel Club was the largest job of any consequence we did at that time.

"Q Did you, during that period of time, have anything to do with the supervising of the construction?

"A Very minor. Mine was mainly the estimating and office end. Dawson handled the outside work.

"Q Where did you maintain offices?

"A We maintained our offices at my home.

"Q Did you have any construction job for the storing of materials?

"A Yes. My offices now are used as a storage yard.

"Q Where is that?

"A At 775 Northwest 21st Street.

"Q Have you been subject to colds?

"A No, sir.

"Q Did you ever have pneumonia?

"A No, sir.

"Q Influenza?

"A Possibly influenza. I had cat

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fever when I was in the Navy. Is that the same thing?

"Q Do you recall any confining or incapacitating illnesses from the time you had diptheria, let us say, up until the time you went to the University of Virginia.

"A No, sir.

"Q That was in 1923 and 1924. And from 1924 on through to the time that you went into the service in 1943, do you recall any simple illnesses or illnesses that were incapacitating?

"A The only thing that I was hospitalized for, I had a nose operation. I think it was called a submucous. They chipped some bone out of my nose. That is the only thing.

"Q With reference to the cat fever, how did you feel at the onset of this? Did it pain you in any part of your body?

"A I guess it is more of a cold than anything.

"Q Did it cause you to cough?

"A No. I think my head was stopped up. That was all.

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"Q What caused you to report for sick call?

"A Well, the main thing, Navy divers are controlled by the Medical Corps of the Navy, and at that time I was instructing the diving school there and going into the decompression chambers. If you have a cold or anything like that, you can't take it because it goes against your ears.

"That was the reason that I caught this cold or cat fever, whatever they call it. I had to report to sick bay for that. They released me from sick bay.

"Q Did you say you were hospitalized on this occasion about a week?

"A I was in sick bay about a week. That wasn't for yellow jaundice. That was the cat fever.

"Q Do you recall what type of treatment you received for this fever?

"A I guess it was maybe aspirin.

"Q Did you run a high fever?

"A Not an extreme fever. I ran a fever, but it wasn't a high fever.

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"Q Did you have any chest congestion in connection with it?

"A No, sir.

"Q Had you ever had a recurrence of either the cat fever or the jaundice?

"A No, sir.

"Q That was when?

"A '43.

"Q What time in 1943?

"A It must have been the latter part, because it was cold--November, I guess, October or November.

"Q From that time until the time you were injured in August of 1945, was there any incapacitating illness that you had?

"A No.

"Q Did you ever have to report on sick call that you recall?

"A Between these dates?

"Q Yes.

"A No, sir.

"Q Then your next incapacitating illness was in August of 1945 when you were injured in this accident about which

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you told us?

"A Right.

"Q. When you were released from Bethesda in October of 1947, when was the next time that you had any illness?

"A. That was around Christmas of '46.

"Q. 1946.

"A. 1946, yes, sir.

"Q. That was while you were still in the hospital at Bethesda?

"A. No.

"Q. The first illness you suffered that was incapacitating was after you were discharged in October, 1947?

"A. That is correct.

"Q. What about the complications?

"A. Well, the complications, the osteomyelitis in my legs. My leg was still paining in Bethesda, because they were anticipating taking both legs off at the knees.

"Q. I am particularly interested, Mr. Green, in any respiratory complications during that particular period.

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"A. None whatsoever."

MR. HASTINGS: I don't think the rest is material or relevant. If you plan to read all yours, then I'll read all of this.

MR. BRADFORD: I plan to read only a page and a half.

MR. HASTINGS: All right.

"Q. How long was it approximately, from the time that you were examined at Veterans Hospital in January of 1957 until you consulted Dr. Rogers?

"A. I did it immediately.

"Q. As soon as you got the report?

"A. The day he gave me the diagnosis that is the day I went to see Dr. Rogers.

"Q. Was it at that time that Dr. Rogers decided to consult with Dr. Daughtry?

"A. Yes, sir.

"Q. Then after you were examined in January of 1956 at the Veterans Hospital, you then consulted Dr. Rogers and Dr. Rogers called in Dr. Daughtry in consultation. Were you then examined by Dr. Daughtry?

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"A. Yes.

"Q. That would be approximately January of 1956?

"A. I think it was in January or February.

"Q. What type of examination did Dr. Daughtry give you?

"A. Well, they started, as I said, the sputum for the State Board of Health which came back negative. They took X-ray pictures of my throat and lungs.

"They put that thing down my throat, with the instrument they had, and that just about covers the examination.

"Q. How often did you consult with Dr. Daughtry, beginning when he was called in for consultation?

"A. Well, several times. In other words, after the sputum tests came back from the State Board of Health and the X-rays and all, he decided to have a biopsy examination, I presume, of my throat to check, to be sure of any malignancy of the thing, the throat part. That was approximately a week after I first

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saw him. In other words, he went right to work on me. He did a biopsy and the cancer had gone through the throat to the lymph gland, the right throat. They removed the lymph gland and it was malignant. The malignancy was on the top of my left lung and had gone from my throat to the lymph gland on the right-hand side.

"Q. Have you been treated by anyone for your conditions that you have described other than the physicians at the Marine Station and Veterans Hospital and the staff at Mercy Hospital and Dr. Rogers and Dr. Daughtry and Dr. Chesley?

"Have there been any other physicians who have treated you?

"A. At the Marine Station and at the Veterans Administration they did not treat me whatsoever.

"Q. I will enlarge my question to include examinations as well as treatments.

"A. Not as I recall. No, that is all.

"Q. Those are the only place that you

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have been examined and treated and those are the only physicians you have had?

"A And in Dr. Daughtry's firm there is a Dr. John Chesney and Dr. Tate. However, they gave me some mustard injections.

"Q In what branch of medicine are they?

"A Thoracic."

MR. HASTINGS: That is all.

MR. BRADFORD: Following what Mr. Hastings read on page 20, I am reading from page 21:--

MR. HASTINGS: Is that from the deposition or from the transcript?

MR. BRADFORD: Page 21 of the deposition.

MR. HASTINGS: Let the record show this is as of October 25, 1957.

"Q Is that road tractors and heavy road building machinery?

"A Yes, that's right; cranes and road building equipment.

"We did runway work and all state roads in conjunction with the aprons.

"Q What type of roads and runways did you put down there?

"A Well, it was cracked out of rock

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broken the same way we put down here--coral rock.

"Q Was it surfaced or bared?

"A No, it was not surfaced.

"Q Was it just excavation of the surface material?

"A That's right.

"We were handling lime rock, with sea water. We had to keep the water trucks running on it all the time to keep the dust down.

"Q How long were you engaged in that particular operation?

"A Well, up to VJ Day.

Q In other words, you were there from when to when?

"A Well, I can't give you the exact dates on that.

From the invasion of Iwo Jima--- I don't know. MAG 22 was supposed to go to Iow Jima. There was a change of orders. We were sent from Guam and we were maintenance for NST at Guam until VJ Day--from Saipan to Guam.

"Q You went to Eimreitok first, as I understand it.

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"A Yes.

"Q Do you have any recollection of approximately how long you were there? Was it a matter of months?

"A Possibly I was there eight or ten months."

MR. BRADFORD: Counsel read on page 25 the following:

"Q Did you receive any other injuries that you know of other than the fracture of your knees?

"A Yes, I had a skull fracture. My skull was fractured and my jaw was broken--some ribs broken.

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"Q. Is there anything else?

"A. I was pretty well broken up on bones.

"They did an operation on Guam to relieve the pressure on my brain because I was unconscious for some, I think, 17 days, something like that. That is all hearsay. I'm just saying what I heard. That relieved the pressure on my brain.

"Q. Did you have any residual effects from these injuries? Other than the knee complications.

"A. No, sir.

"Q. So far as you can determine from your own feelings, has your condition changed since--substantially one way or the other, the last 18 months?

"A. Well, I'll tell you a funny thing about cancer: there is no pain to it, unless it is in the last stages.

"I have had no pain from the cancer whatsoever. The doctors treatments have been worse than the cancer."

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MR. BRADFORD: That is all.

THE COURT: Is that the end of the plaintiff's testimony?

MR. HASTINGS: Your Honor, the plaintiff rests.

THE COURT: The plaintiff rests.

MR. BRADFORD: May the jury be excused?

THE COURT: The jury will be excused now until 9:30 Monday. Be in the box a little before 9:30. Be extremely careful to follow my admonition about not talking about the case among yourselves or with anybody else or permitting it to be discussed in the presence of the jury.

Do not talk about any of the people that have any connection with the case or any subject matter that is concerned in this case. Do not read or listen or look at television or anything like that, or anything else that has any comments about the case. For the reasons I have announced to you, that is very important.

Be here Monday morning and the defense will take over and we will progress, I hope, to a conclusion in a few days.

Thank you.

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(Whereupon, the jury retired from the courtroom, and the following proceedings were had:)

MR. BRADFORD: In addition to a proffer heretofore made about the smoking of Mr. Green, I proffer also to prove through Dr. Daughtry that in the records of their office they have a statement from Mr. Green in the history that they took from Mr. Green that he has been a very heavy smoker of about three packages of cigarettes a day for some 25 or more years, but only two packages for recent years.

That is a direct quote from the doctor's records.

And I proffer that testimony and will prove it by the doctors as a part of the history that they took from Mr. Green as to his smoking habits.

MR. HASTINGS: Just so the record is clear, I did not proffer that from Mr. Green's testimony.

MR. BRADFORD: I don't feel it is material, but I will proffer that in Mr. Green's own testimony he stated that he had smoked something between one and two packages of cigarettes and, as has been stated by Mrs. Green, it was something like two or possibly two and a half.

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Dr. Daughtry's records state as counsel has just stated there, that in recent years he had gotten up as high as three, which is what I believe the Court of Appeals opinion said, that somewhere between one and three had been the amount of packages smoked. So I think the Court of Appeals is correct in stating that was what the evidence showed.

THE COURT: I am going to deny the motion. I think this is within the confines of the limitation of the Court of Appeals.

MR. BRADFORD: Then for the record, as I understand it, your Honor's ruling is based upon your interpretation of the ruling of the Fifth Circuit in that regard?

MR. HASTINGS: I don't think your Honor should necessarily have to give your reasons. That is a question for argument on the part of counsel.

THE COURT: I don't mind giving it if it goes up again.

Number one, it says we shouldn't re-litigate the issues of that case. That is what the Fifth Circuit said among other things.

MR. BRADFORD: Your Honor, I offer that because my interpretation of the opinion of the Fifth

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Circuit in that regard was that they took the prerogative away from a jury in their findings, so to speak, and they said this does not leave this element as a real issue in the case unless on another trial a different state of facts is presented.

I think we are presenting a different state of facts as to Mr. Green's condition and as to the amount of smokes or smoking.

THE COURT: I think the exact same state of facts existed in both of them.

MR. BRADFORD: Then your Honor denies the proffer?

THE COURT: Yes.

MR. BRADFORD: At this time, after the plaintiff has announced th' the plaintiff rests, the defendant moves the Court to direct a verdict in favor of the defendant and against the plaintiffs on the ground to wit:

1) there has been no proof of the charges made in the Complaint against the defendant;

2) there has been no proof that the cigarette itself is unwholesome or an unfit product for use by the general public;

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3) there has been no proof of any breach of warranty;

4) there has been no proof of the charges made in the Complaint in the issues that are left to be tried when the case was sent back for further trial.

We feel that under these circumstances there is not any issue to go before the jury to determine this case. We are trying it, as I understand it, on the issue of whether or not the cigarettes are reasonably fit for the general public.

THE COURT: That's right.

MR. BRADFORD: I don't think there is any issue here of negligence. There is no issue here that Lucky Strike cigarettes were---

THE COURT: It comes up on the implied warranty, Mr. Bradford, the reasonable fitness. And the question is well stated clearly by the Fifth Circuit, whether they were reasonably fit and wholesome.

And the Fifth Circuit said that they concluded that the defendant was not entitled to a directed verdict on any of the grounds urged, and one of the grounds urged was that there was no showing that they were not reasonably fit and wholesome. So, I will

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have to accord my judgment with theirs, and I think there is plenty of evidence here from which a jury could conclude that they were not reasonably fit and wholesome.

I don't quarrel with that theory at all. I quarrel with the implied negligence through the faulty premise of implied warranty.

MR. BRADFORD: I thoroughly agree with your Honor.

THE COURT: But I don't say that I share the majority of the opinion, because I think the majority of the opinion is against mine. I certainly bow to their wisdom, so to speak.

(Whereupon, the trial in the above-styled cases convened at 4 o'clock p.m., to resume trial Monday, November 23, 1964 at 9:30 a.m.)

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